IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-793

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner

and

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[redacted]

BRIEF AMICUS CURIAE

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November, 1979

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the movement of coal to supplant oil and gas at rates which are consonant with the provisions of the Railroad Revitalization and Regulatory Reform Act and which have been arrived at under sound principles of administrative law.

Your amicus believes that his transmitting the experience obtained through hearings on railroad coal rates by our Subcommittee on Oversight and Investigations may be helpful to the Court, particularly in placing these cases in the context of the immediate and important policy issues and problems of our times. It is your amicus' view that to let the Court of Appeals decision stand would gravely and adversely affect these issues and problems.

Wherefore, the amicus respectfully requests that this motion be granted.

Respectfully submitted,

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No.

Houston Lighting and Power Company,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

As a Member of Congress, the amicus curiae has a substantial interest in the outcome of these cases determining railroad rates for coal shipments to the Southwest. This interest is distinct from that of petitioners or respondents.

Your Amicus served on the House Committee which drafted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). This session, he has chaired an extensive series of Congressional hearings concerning the escalation of railroad coal rates since enactment of the 4-R Act.* The amicus also served as a Member of the Ad Hoc Committee on Energy and the House-Senate Energy Conference Committee in the 95th Congress. He continues to serve as a Member of both the Interior and Insular Affairs and the Interstate and Foreign Commerce Committees, the leading energy-writing committees in the House of Representatives.

Finally, should the Interstate Commerce Commission permit the imposition of a multi-billion dollar burden on Southwest industrial and residential consumers without

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*See III of Argument, p. 33

proceeding in the manner required under the 4-R Act, such action would be devastating to this Members' Congressional District and to an entire region of the country.

Therefore, the amicus has a major interest in overturning ICC action which errs to the detriment of the consuming public.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case is in the mainstream of governance of Congressionally delegated authority. Were the decision below upheld it would seriously frustrate Congressional control of agency action.

The kernel of both the erroneous action of the Commission and the error of the Court below is this: the rates established were neither justified under traditional ICC ratemaking principles nor under a new standard established by rule in advance --

as is required by Section 205 of the 4-R Act. This constituted not simply an error of timing or of forum selection but also a major departure from an important, Congressionally mandated process for carrying out Congressional policy and implementing specific statutory standards.

Congress had a difficult task in delineating a fair, practical and reasonable course for affording railroad revitalization and recovery. It was necessary to balance two important needs. Railroads were to be provided adequate revenue levels on condition that they have honest, economical, and efficient management. At the same time, Congress sought to protect the captive shipper where such shipper is not protected by competition--that is, in monopoly markets.

In a matter so fraught with difficult problems of economics and of commercial equity and fairness, the courts must en-

force the clearly mandated procedural process requiring promulgation of standards by rule. Otherwise Congress would have no means of assuring that such important goals were balanced in accordance with its policy determinations.

That is why Congress did not permit in the 4-R Act the kind of case-by-case process which characterizes this proceeding. Section 205 commands establishment of the relevant standard by rule.

The petition before the Court is also extremely important in light of national objectives. The decision below jeopardizes the fulfillment of national energy and anti-inflation goals, and therefore this case is of unusual importance. The decision below will impede efforts to spur coal utilization and to reduce oil imports. Furthermore, the issue is ripe for review in light of extensive development of the facts and

issues by Congress, the executive branch, and the ICC itself.

For these reasons the petition for certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW, IF ALLOWED TO STAND, WOULD SERIOUSLY FRUSTRATE CONGRESSIONAL CONTROL OF AGENCY ACTION

The Importance of the Case Transcends that of a Mere Dispute Between the Parties

The importance of the case presented for review transcends that of a mere dispute between interested parties. As the Court of Appeals emphasized, this proceeding involves questions of first impression concerning major provisions of the Railroad Revitalization and Regulatory Reform Act. Pub. L. No. 94-210. Moreover, the specific disposition of this case will heavily influence the degree of public

accountability of numerous federal regulatory agencies.

Since the New Deal and the accompanying erosion of the non-delegation doctrine, Congress has been faced with policy decisions of increasing complexity. These problems are often fraught with highly technical economic and social consequences as well as problems of equity and fairness. There could be no better example of this complexity than that shown in the instant case.

The period beginning just before the Arab oil embargo has also been marked with legislation in which Congress must provide broad substantive delegation and then depend upon procedural mechanisms to assure compliance with legislative intent. The more broadly substantive authority must perforce be granted, the more exactly must the process by which it is implemented be applied if the concepts embodied in the legislation are to be respected.

Congress has sometimes attempted to skirt these problems through the legislative veto process, and the increasing use of this mechanism is evidence of the growth of the problem. See Congressional Research Service of the Library of Congress, Congressional Review, Deferral, and Disapproval of Executive Actions (1976). In other areas, Congress has relied on rulemaking procedures under carefully defined standards specifying both the scope and manner of rulemaking authority. Such is the case in so many recent statutes in the federal agency field that is would be cumbersome in this brief treatment to enumerate them all. A few examples will suffice: the intensely due process oriented FTC rulemaking embodied in the Magnuson-Moss Act, 15 U.S.C. § 57a (1977); the two-level rulemaking in the Toxic Substances Control Act, 15 U.S.C. §2605 (1977); and the requirement of Section 205 of the 4-R Act involved here,

Pub. L. No. 94-210 §205.

Thus it can be seen that such processes as those provided in Section 205 are quintessential to the protection by Congress of its basic policy determination. A careful balance must be obtained between providing railroads with adequate revenue levels and preventing them, in a case where they have market dominance, from obtaining these levels solely or principally from captive shippers through exorbitant rates for a commodity in high demand. If such balance is to be obtained, the process which Congress has delineated for achieving it must be strictly adhered to. Had it known that its procedural directive of rulemaking would be ignored by the Commission and not enforced by the court, Congress would have followed some other course of restraining agency action: the legislative veto or perhaps less delegation to the ICC.

This is a major reason why the decision below must be overturned. If it is allowed to stand, the ICC will succeed in evading the requirements of Section 205 of the 4-R Act which mandate action by rule. Other regulatory agencies will be encouraged to circumvent similar safeguards established by Congress.

The Agency Evaded Congressionally Mandated Rulemaking Requirements

Section 205 of the 4-R Act of 1976 directed the Interstate Commerce Commission to develop and promulgate "reasonable standards and procedures for the establishment of [railroad] revenue levels adequate under honest, economical, and efficient management . . ." by February 5, 1978. Notice and an opportunity for hearing was required. Pub. L. No. 94-210.

When the ICC issued its decision in the Houston Lighting and Power (HL&P) and Arizona Electric Power Cooperative (AEPC)

cases in November, 1977, the agency had initiated but not yet completed a rulemaking proceeding pursuant to Section 205. 42 Fed. Reg. 14740 (1977). However, notwithstanding the pendency of this rulemaking proceeding, the agency premised its rate determinations in these individual cases largely on the basis of the "revenue need" considerations of Section 205.

In the absense of final "revenue need" regulations, the ICC applied arbitrary "revenue need proxy tests" in HL&P. Even the agency admitted that its revenue need "proxy measures would, if anything, contain overstatements." Docket No. 36608, Incentive Rate on Coal--Cordero, Wyoming to Smithers Lake, Texas (Served November 30, 1977) (unprinted), p. 35. However, not to be deterred by this conclusion, the Commission relied heavily on these tests in its rate analysis. Such clearly

unlawful action must not be condoned by the courts. 5 U.S.C. §706(2) (1977). Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). Greater Boston Television Corp. v. FCC, 444 F. 2d 841 (D.C. Cir. 1971).

Petitioners emphasize the argument that Section 205 was not intended to apply in individual rate proceedings such as the HL&P and AEPC cases. In fact, the regulations proposed in March, 1977 to implement Section 205 were limited in application to general rate increase proceedings.[1/] 42 Fed. Reg. 14740 (1977).

However, assuming arguendo that Section 205 is applicable in individual rate proceedings, Congress clearly envisaged

1/ A general rate increase is an increase sought by substantially all railroads involving a substantial number of commodities. 49 C.F.R. §1102.1 (1978).

that consideration of Section 205 principles in such proceedings would await the promulgation of uniform standards and procedures. The ICC must not be allowed to evade this specific Congressional directive, particularly in view of this Court's declaration that "the function of filling in the interstices" of legislation "should be performed, as much as possible, through promulgation of rules to be applied in the future." SEC v. Chenery, 332 U.S. 194, 202 (1947).

Review by this Court is especially critical under the circumstances of these cases. The agency not only ignored required rulemaking procedures. It also overturned long-standing precedents [2/]

2/ As the Court below recognized, under traditional principles which controlled for decades, a carrier's overall revenue needs had no relevance to the determination of an individual rate.

and retroactively applied new standards without any advance notice to the parties.

Thus, it is clear that development of sound principles of administrative law will suffer if the questions posed in these cases remain unanswered. Previous decisions of this Court, decisions of the Circuit Courts, and leading treatises on administrative law all suggest the importance of these questions and the impropriety of the decision below. Morton v. Ruiz, 415 U.S. 199 (1974). Port Terminal R.R. Ass'n v. United States, 551 F. 2d 1336 (5th Cir. 1977). Hill v. FPC, 335 F. 2d 355 (5th Cir. 1964). See also, K.C. Davis, Administrative Law Treatise §7.25 (1979).

Moreover, the "revenue need proxy tests" applied in HL&P did not simply diverge significantly from traditional ratemaking principles. They also departed markedly from subsequent "revenue need"

regulations, 49 C.F.R. §1109.25 (1978), and the agency's statutory mandate.[3/] Thus, they are neither consistent with the directive of the 4-R Act nor are they consistent with traditional ICC ratemaking principles.

The "revenue need proxy tests" result entirely from the inability of the Commission to formulate uniform standards properly and fully before applying any new ratemaking criteria. Had the rate determinations been governed by standards existing prior to or subsequent to the instant cases, the decisions would have been more favorable

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3/ For example, the "proxy tests" applied in HL&P at best reflect rough return on net investment estimates. However, the statute, legislative history, and subsequent regulations clearly preclude exclusive reliance on return on net investment estimates as the sole measure of carrier revenue adequacy. 49 U.S.C.A. §10704 (a) (2) (1979). S. REP. NO. 499, 94th Cong., 1st Sess. 52 (1975). 49 C.F.R. §1109.25(a) (1978).

to Southwest consumers. 4/

The 4-R Act states the national policy "to balance the needs of carriers, shippers, and the public." Pub. L. No. 94-210 §101 (b)(1). In interpreting this policy, the ICC has stressed that "consideration of shipper and public interests requires that revenue adequacy be taken not only as a goal but also as a limitation. . . . [w]e are to assist the railroads in attaining revenue adequacy, and to protect the public from having to provide revenues that exceed an adequate level." Ex Parte No. 338, Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels (Served February 3, 1978) (unprinted),

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4/ San Antonio, Texas v. Burlington Northern, Inc., 355 I.C.C. 405 (1976), aff'd sub nom Burlington Northern, Inc. v. United States, 555 F.2d 637 (8th Cir. 1977). Annual Volume Rates on Coal-Wyoming To Flint Creek, Arkansas, Docket No. 36970 and Southwestern Electric Power Co. v. Burlington Northern, Inc., Docket No. 36980, Combined Decision Served May 25, 1979 (unprinted).

pp. 7-8.

Revenue need "proxy tests" developed in an expedited adjudicatory proceeding simply could not provide the delicate balance between carrier, shipper, and consumer needs which the Congress intended.

In Ignoring Rulemaking Requirements, The Agency Acted Arbitrarily and Capriciously

The court below conceded problems with the "proxy tests" adopted by the Commission as "indicia of revenue need." However, it emphasized that its approval of the proposed rates was justified under the governing "standard of judicial review." According to the Court, this standard of review "is narrow in general for ratemaking, and . . . is pinched to the point of exiguity when what is involved is an agency action under a temporary approach in force only pending completion of a more fully considered proceeding."

It is well-accepted that findings of fact based upon substantial evidence are binding upon the courts as well as the parties. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). However, the deference owed an expert tribunal has never encompassed judicial approval of arbitrary or unlawful agency action. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968). This Court has emphasized that "expert discretion is the lifeblood of the administrative process, but unless . . . the requirements for administrative action [are made] strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." Burlington Truck Lines v. United States, 371 U.S. 156 (1962).

Thus, this Court must overturn the decision below because it would permit

the ICC to circumvent the carefully crafted statutory scheme by issuing ad hoc decisions prior to the completion of mandated rulemaking proceedings.

Moreover, the scope of review applied in the decision below is not supported by the precedents cited by the Court of Appeals or 4-R Act policies. Notwithstanding the contention of the court below that "temporary" action deserves extra deference, none of the cases cited support the proposition that arbitrary or unlawful action should be condoned. At most, these decisions stand for the principle that an energy emergency justifies acceptance of agency reasons and findings which are less detailed than those required in non-emergency circumstances.

Nor is the decision below supported by 4-R Act policies. In enacting the railroad reform legislation, Congress substantially limited the workload of the ICC

and the courts by eliminating rate regulation in competitive markets. 49 U.S.C.A. §10709 (1979). By retaining jurisdiction in noncompetitive markets, Congress clearly intended to ensure meaningful agency and judicial review "to protect against abuse of market power." H.R. REP. NO. 725, 94th Cong., 1st Sess. 69 (1975).

II

THE DECISION BELOW, IF ALLOWED TO STAND, WOULD JEOPARDIZE THE IMPLEMENTATION OF NATIONAL ENERGY AND ANTI-INFLATION POLICIES

The petition before the Court is extremely important in light of national objectives. Energy and inflation problems represent the two most urgent issues facing the Nation today. Post-4-R Act rate increases, first approved in the decision below, clash with critical energy and anti-inflation goals.

Expanded coal use and conservation of oil and natural gas represent the major

short-term measures available to cut this Nation's overdependence on imported oil. Congress in its 1978 session underscored its support for these essential policies by enactment of the following four Acts: the Powerplant and Industrial Fuel Use Act, Pub. L. No. 95-620, 92 Stat. 3289 (1978), the Energy Tax Act, Pub. L. No. 95-618, 92 Stat. 3174 (1978), the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978), and the National Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978). The recent ban on Iranian oil imports heightens the need for effective implementation of coal conversion and conservation measures.

Resolution Here Will Help Resolve Many Pending Cases

The implementation of these important national energy policies has been severely impeded by the precedents established in

petitioner's cases. The instant cases initiated a trend which has continued unabated in eight subsequent ICC coal rate cases. All of these later cases are currently on appeal in various United States Courts of Appeal.[5/]

5/ Docket No. 36180, San Antonio, Texas v. Burlington Northern, Served Oct. 25, 1978 (unprinted), reopened and modified in Docket No. 36180, San Antonio, Texas v. Burlington Northern, Served June 1, 1979 (Appeal docketed, No. 78-2051 and 78-2307, D.C. Cir.); Docket No. 36936, Incentive Rate On Coal--Hayden, Colorado To Kings Mill, Texas, Served Nov. 7, 1978 (unprinted) (Appeal docketed, No. 78-3651, 5th Cir.); Docket No. 36970, Annual Volume Rates On Coal--Wyoming To Flint Creek, Arkansas and Docket No. 36980, Southwestern Electric Power Co. v. Burlington Northern, Served May 25, 1979 (unprinted) (Appeals docketed, No. 79-2082, 5th Cir. and No. 79-1547, D.C. Cir.); Docket No. 36719, Arkansas Power & Light Co. v. Burlington Northern, Served June 18, 1979 (unprinted) (Appeal docketed, No. 79-2491, 5th Cir.); I & S No. 9199, Unit Train Rates on Coal-Burlington Northern, Served July 13, 1979 (unprinted) (Appeals docketed, No. 79-1534, 8th Cir. and No. 79-1712, D.C. Cir.); Docket No. 37078, Bituminous Coal, Hiawatha, Utah to Moapa, Nev., 361 I.C.C. 923 (1979) (Appeal docketed, No. 79-1840, 10th Cir.); Docket No. 37063, Increased Rates on Coal-Louisville and Nashville R.R. Co., Served August 29, 1979 (unprinted) (Appeals docket-

In all ten decisions issued since enactment of the 4-R Act, substantial coal rate increases have been authorized. Although the rate treatment in HL&P and AEPC is generally more oppressive on consumers than in the subsequent cases, all of the rates substantially exceed those deemed reasonable under traditional ICC standards. Moreover, in all ten decisions, Section 205 of the 4-R Act was invoked as the primary justification for the rate increase, and the Commission acted on the basis of interim, rather than fully implemented, "revenue need" standards and procedures. [6/]

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ed, No. 79-2090, No. 79-2172 and No. 79-2300, D.C. Cir.); Docket No. 37105, Increased Rates on Coal, Colstrip and Kuehn, Mt. to Minnesota, Served October 26, 1979, (unprinted) (Appeals docketed, No. 79-2295 and No. 79-2286, D.C. Cir.).

6/ The HL&P and AEPC decisions were the only decisions issued prior to the promulgation of any "revenue need" regulations. However, all ten decisions were issued

Singling Out Coal Traffic To Bear A Disproportionate Share of Railroad Financing Is Improvident

Beginning with the issuance of the HL&P and AEPC decisions, coal traffic has been singled out to bear a disproportionate share of railroad financing efforts. ICC consideration of Section 205 "revenue need" criteria has been almost exclusively confined to coal rate cases. In these cases, the Commission has required coal shippers to subsidize non-coal traffic without requiring a finding that alternative means for increasing revenues or decreasing costs are foreclosed.

This approach is inconsistent with the agency's continuing obligation to assure the reasonableness of rates in

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prior to the completion of the first annual revenue adequacy proceeding. The Commission's initial regulations, 49 C.F.R. §1109.25, had required the completion of this first annual proceeding by November 30, 1978 but this proceeding remains uncompleted more than eleven months later.

noncompetitive markets. 49 U.S.C.A. §10701 (1979). Moreover, the ICC's action cannot be reconciled with the 4-R Act policy "to balance the needs of carriers, shippers, and the public" or the Act's emphasis on assuring revenue adequacy only under "honest, economical, and efficient management." 49 U.S.C.A. §10704 (a)(2).

However, the ICC action in petitioner's cases is not just inequitable and unlawful. These decisions have severely jeopardized the fulfillment of national energy goals. Unless this Court reviews these cases, widespread litigation will continue and important national policies will continue to suffer.

The Department of Energy has warned that recent ICC ratemaking decisions adversely affect coal conversion efforts. Escalation of Railroad Coal Tariffs. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on

Interstate and Foreign Commerce, 96th Cong., 1st Sess. (April 16, 1979). Leading national and international energy experts have emphasized that escalating coal tariffs discourage the replacement of existing oil- and gas-fired boilers with coal-fired units. President's Commission on Coal, Special Hearings on Lessening Oil Dependency Through Greater Coal Use (unprinted) (May 29, 1979). International Energy Agency, Steam Coal: Prospects to 2000 (1978), pp. 12, 30, 101.

Moreover, even the ICC's own Office of Policy and Analysis recently conceded that oil imports increase as railroad rates increase. The agency concluded that continued approval of coal rates based on the tests applied in petitioner's cases or the standards applied in subsequent coal rate cases will significantly affect coal consumption and oil import levels. Interstate Commerce Commission,

Draft Environmental Impact Statement, Ex Parte 347, Western Coal Investigation - Guidelines for Railroad Rate Structure (1979). This conclusion is extremely important since it emerges from the ICC's first comprehensive analysis of the energy consequences of escalating coal tariffs.

Although the court below recognized the interest of the public in coal conversion, it justified its decision, in part, on the grounds that "neither the interest of the electric consumer in lower rates nor that of the public in coal conversion dictates that the railroads must receive compensation for their services inadequate to maintain financial soundness." But there is nothing in the decision that demonstrates that the railroads would be unable to maintain financial soundness if the rates had been set at lower levels. Neither the agency nor the court considered

whether the railroads had maximized the contribution of non-coal traffic or aggressively pursued productivity and efficiency improvements. Given the critical energy goals at stake, such arbitrary action must not be allowed to stand.

Anti-Inflation Considerations Require Review of Petitioner's Cases

Anti-inflation considerations also require the court's review of petitioner's cases. In recent months, sharply escalating energy prices have been the major contributor to the double digit inflation rate which threatens this Nation's economy. Since January, 1979, refined petroleum prices have increased 79.5 percent on an annualized basis. In contrast, wholesale coal prices have increased only 3.4 percent during this period.

It is clear that coal offers one of the most important alternatives available to rescue this Nation from the economic de-

vastation of OPEC-triggered energy price inflation. Therefore, it is essential to prevent the railroads from exploiting their monopoly position and expropriating the intrinsic economic advantage of domestic coal supplies.

With respect to the HL&P case alone, the rate authorized by the ICC will cost consumers over $40 million annually above the rate initially quoted by the railroads. This increase amounts to more than a billion dollars over the life of the coal plant. Escalation of Railroad Coal Tariffs. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (April 16, 1979).

The Commission's Comparable Rate Analysis Is Inconsistent With the Policy of the 4-R Act and Constitutes a Dangerous Precedent

What is even more dangerous is the precedent established by the court below

that the ICC may consider the upward pull of OPEC cartel forces in ratemaking. Under the court's decision, the increased demand for coal transportation following the OPEC oil embargo is entitled to great weight in evaluating comparable rates and in applying other tests of rate reasonableness.

Analyses of rates for traffic with similar cost characteristics (i.e. volume and distance of haulage) have always played a major role in determining maximum rate levels. Burlington Northern, Inc. v. United States, 555 F. 2d 637 (8th Cir. 1977). However, in the HL&P case, comparability was judged largely on the basis of demand rather than cost factors. The Commission discredited comparisons with rates "negotiated prior to the OPEC oil embargo" or "depressed by competition" from other coal sources and relied on a rate deemed to most closely reflect the current value of coal transportation.

The abuse of the comparable rate standard, sanctioned by the court below, deserves this Court's attention. Thousands of utility consumers will pay heavily for reliance on demand-based comparable rates. This factor tipped the scales in the HL&P case in favor of the $15.60 per ton (9.7 mills per ton-mile) rate proposed by the railroads. The cost-based comparable rates proferred by the shippers averaged $17.5 million less on an annual basis than the rate approved by the ICC.

Moreover, the Commission's comparable rate analysis is inconsistent with the policy of the 4-R Act. The entire thrust of the railroad reform legislation is to allow a "wider operation of competitive forces in the marketplace." H.R. REP. NO. 725, 94th Cong., 1st Sess. 69 (1975). By deregulating competitive markets and retaining regulation in non-competitive markets, Congress clearly reflected the

view that regulation should function as a surrogate for competition where competition does not exist. It is inconceivable that Congress intended the ICC to set coal rates in captive markets with reference to rates inflated by OPEC cartel forces.

The Commission's "comparable rate" analysis also runs counter to several important court decisions. Most prominent is an 1897 case, Van Patten v. Chicago, M. & St. P. Ry. Co., 81 F. 545, 550 (1897). See also Aluminum Co. of America v. ICC, 581 F. 2d 1004 (D.C. Cir. 1978).

Given the widespread adverse impact of the decision below, an early and definitive ruling of this Court is sorely needed. The questions at stake affect thousands of individuals and businesses throughout the Nation. Continued uncertainty about future coal rate levels will continue to deter investments in coal-fired facilities and jeopardize the fulfillment of national

energy goals.

III

THE ISSUE IS RIPE FOR REVIEW IN LIGHT OF EXTENSIVE DEVELOPMENT OF THE FACTS AND ISSUES BY CONGRESS AND ADMINISTRATIVE AGENCIES

Because of its interrelationship with so many other important issues of the day (as we have previously pointed out), the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce has examined in great depth the matter of railroad coal rates in markets where there is railroad market dominance. In so doing, we have brought before us a number of agencies which have closely examined various aspects of this matter in their respective fields. Escalation of Railroad Coal Tariffs. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess.

For instance, the Department of Energy has examined and addressed us concerning the affect of escalating coal rates on conversion of gas- and oil-fueled facilities to coal. The Department of Transportation has testified concerning regulation of captive coal shippers. The ICC has discussed its ratemaking efforts. The Office of Rail Public Council has underscored the procedural disadvantages faced by shippers seeking financial data which is in the exclusive control of the railroads.

The Subcommittee has had before it ten representatives of these agencies as well as a member of the Texas Railroad Commission. Hearings have been held in Washington, San Antonio and Houston, where representatives of municipal and privately owned utilities and railroad spokesmen have appeared. In all, forty witnesses have appeared before the Sub-

committee during six days of hearings.

Facts and policy enunciation have been addressed respecting the HL&P and AEPC cases. We have also developed specific information concerning the major subsequent coal rate cases, particularly the Louisville and Nashville (L&N) proceeding involving a 38 percent rate increase on coal movements to the South and Midwest.

Extensive hearings on the broader question of railroad rate deregulation have proceeded in the Transportation and Commerce Subcommittee of the House Commerce Committee. All told, over ten staff members of the House Commerce Committee have been devoting substantial time to the accumulation of a vast body of information from the agencies, businesses and individuals aforementioned. This is not to mention the work on the yet broader questions involving coal and

energy under investigation by other staffs in the House Committees on Interstate and Foreign Commerce (Energy and Power Subcommittee), on Interior and Insular Affairs, on Public Works and Transportation, and on Science and Technology. Comparable work is going on in the Senate.

These facts not only measure the importance of the matters involved here to the public interest but also show that a decision in this case will facilitate economic planning in a wide swath of business and commerce and avoid costly litigation and delay in the future. Certainly, proceeding with this case is as important for business planning and for meeting energy needs as is the fast track energy legislation now being considered in Congress. H.R. 4985, 96th Cong., 1st Sess. (1979). S. 1308, 96th Cong., 1st Sess. (1979).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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